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IN THE MATTER of the Ontario Human Rights Code

AND IN THE MATTER of a complaint by John George Underwood against the Board of Commissioners of Police for the Town of Smiths Falls, Dr. A.B. Murphy (Chairman) and Their Servants and Agents.

Appearances

Donald Wilson	Appearing on behalf of the Ontario Human Rights Commission
John Kirkland	Appearing on behalf of the Board of Commissioners of Police for the Town of Smiths Falls, Dr. A.B. Murphy and Their Servants and Agents

DEC 24

DECISION

INTRODUCTION

The subject of the hearing before this Board of Inquiry, held in the Town of Smiths Falls on June 27th, August 22nd and November 27th, 1985, was the allegation in the complaint that the Board of Commissioners of Police for the Town of Smiths Falls, its Chairman and their servants and agents (hereafter referred to as the "Board") had denied Mr. John George Underwood his right to equal treatment with respect to employment without discrimination because of his age, in contravention of section 4(1) and section 8 of the Human Rights Code, 1981, Statutes of Ontario, 1981, chapter 53. More particularly, Mr. Underwood alleged not simply that he was not hired by the Board but that, because of his age at that time, his application was rejected in the initial screening, in consequence of which he was neither tested nor granted an interview and his application was not seriously considered.

EXPOSITION OF FACTS

Having regard to the nature of his complaint, it would seem appropriate to provide at the outset a brief resumé of the relevant aspects of Mr. Underwood's personal history. Mr. Underwood was born on November 4th, 1941, in Windsor, Ontario, where he went to school, completing grade 11. In 1962 he entered the armed forces of the United States of America, from which he received an honourable discharge in 1965. During his service there, Mr. Underwood obtained his high school certificate (grade 12), and he received training in various military matters including the handling of weapons, military communications and jungle warfare. He indicated that he had entered the armed forces with some hope of getting into the military police and that his interest in law enforcement remained with him thereafter. While in the American army Mr. Underwood was selected to play on the baseball team representing the United States in the Pan Am Games being held in Venezuela and, upon his release, he was engaged by the St. Louis Cardinals professional baseball team. However, as the result of malaria contracted while in the army he was unable to complete that team's spring training programme, and he returned to Windsor.

Prior to entering the American armed forces, Mr. Underwood had been a member of the Windsor Regiment (1959 to 1962), and he re-joined that regiment for a two year period upon his return to Windsor in 1965. He attained the rank of Sergeant, became an instructor in weapons, drill and first aid, and he took a number of courses associated with his stint in that regiment. Between 1965 and 1969 he was variously employed as a construction worker, a milkman and a bus driver. In 1969, Mr. Underwood was engaged by the Ontario Correctional Services, in whose employment he remained until some time after his unsuccessful application for a position as a police constable in Smiths Falls.

During his employment with the Ministry of Correctional Services, Mr. Underwood first worked in Windsor as a corrections officer for eight months. He then attended the staff school in Guelph, Ontario, where he took a basic training course, remaining there for a few months as a Corrections Officer 1. His duties involved the security, care and

supervision of prisoners. He then went to Burwash, Ontario, as a Corrections Officer 2. His background was such that he began training to be a recreations officer. He became a Recreations Officer 2, and in 1972, went to the Rideau Correctional Centre (located a few miles from Smiths Falls) in that capacity.

Throughout his career with the Correctional Services, Mr. Underwood took a number of courses and programmes, all of which are listed in his application to the Board, and he testified that he had maintained his interest in the possibility of pursuing a career in law enforcement (which interest Mr. Stocker, the Chief of the Smiths Falls police force, said was apparent on the face of Mr. Underwood's application) . In 1980, Mr. Underwood joined the Ontario Provincial Police Auxiliary in order to obtain experience in police work, and to satisfy himself that he could do such work. This voluntary activity in which he was engaged for over two years prior to his application to the Smiths Falls' Board involved training in the classroom and through cruiser duty, and it included assisting the officer to whom he was assigned while on patrol. His interest in this kind of work was also evidenced by his earlier application for a full-time position with the Ontario Provincial Police and with the police at Cardinal, Ontario. The former application was apparently unsuccessful because Mr. Underwood's eyesight did not meet the standard set by that particular force. (According to Chief Stocker, this did not constitute any obstacle to employment on the Smiths Falls force.) Although Mr. Underwood indicated that he was one of six of the 85 applicants to the Cardinal force to have been interviewed, Mr. Underwood could assign no reason as to why that application was unsuccessful, other than the observation that he thought the successful candidate at Cardinal was the reeve's son-in-law.

Under cover of a letter dated July 13th, 1982, Mr. Underwood forwarded to the attention of Chief Stocker his application for employment as a police constable in the Town of Smiths Falls. Although only one position had at first been advertised, it transpired that there were two vacancies, both of which were ultimately filled following the assessment of applications received in response to the following advertisement:

> Sealed applications will be received by the undersigned until 4:00 p.m. July 16, 1982, for the position of Police Constable for the Town of Smiths Falls, Ontario. Salary 4th Class Constable $20,784. per annum. The applicant must be a Canadian citizen or British subject, at least 18 years of age, certified to be in good health and fit for duty as a member of a Police Force and be of good moral character and habits. Application forms may be obtained from the Chief of Police, Town Hall, Smiths Falls, Ontario.

A four-stage process was used to select the two successful candidates from amongst those who had applied. The number of applications handled at each stage is not clear. In his evidence on November 26th Chief Stocker said he could not recall, but thought the initial number was 47. He said that 12 went on to the second stage, and 7 to the third. He did not say how many went to the fourth stage, after which the two successful applicants were selected. However, the Human Rights Officer employed by the Human Rights Commission (hereafter referred to as the "Commission"), one Joseph Donaldson Polley, had given evidence on August 22nd in respect of 60 applications, 15 of which had gone beyond the first stage. In his testimony, Mr. Polley named all 60 of these candidates and provided certain information about each of them. Although nothing significant turns on the discrepancy between his evidence in this regard and Chief Stocker's figures, Mr. Polley's evidence must be accepted. He was prevented from making copies of applications, but he did take notes. Chief Stocker did not bring the applications to the hearing as he was directed to do by a summons dated June 10th, 1985, nor did he have with him notes pertaining to all the applications.

The initial screening at stage one was clearly the responsibility of Chief Stocker, who testified that no applications were finally set aside at this stage except by him. It seems that there were no fixed criteria in accordance with which all or none of the applications might be screened out. Rather the object was simply to make the number of applications more manageable for the purposes of the subsequent stages of a process that the Board had evolved over a period of time. Chief Stocker indicated that some applications might be discarded at this initial stage because, for instance, they were so ineptly formulated as to make incompetence

self-evident; others might be discarded because they revealed a criminal record incompatible with the position of a police constable; other applications might suffer early rejection because they revealed a heavy debt load. Although no evidence was given to the effect that there were any positive attributes that candidates must possess in order to proceed to the next stage in the process of evaluation, Chief Stocker's evidence and the various submissions made by counsel for the Board contain references to the virtues of coming from "good stock" or being a member of a "good family." While Chief Stocker said that the number of applicants who were to survive the initial screening was not fixed, since the object was to reduce the number of applications going forward it may be inferred that some applications might be discarded after comparison with others.

In deciding which applications to discard and which to retain, Chief Stocker testified that he did not confine his attention to the information in the applications and their supporting documents. He consulted in an unstructured and loose way with members of the force on duty at the time, and he solicited the views of other members of the community with respect to certain of the applicants. The members of the Board were also given an opportunity to comment on all the applications at this initial stage. Chief Stocker testified that "the members of the Police Commission also viewed them, the applications. They sometimes make recommendations if they know the person or whatever. Very seldom would they reject anybody outright, but they did have the opportunity to view them and also would give me comments if the person was known to them."

Mr. Underwood's application, along with all but 12 or 15 others was discarded at this initial stage. The remaining applicants were given a kind of intelligence-cum-aptitude test and, according to Chief Stocker, this reduced to 7 the number who were interviewed by the Board. In consequence of the interviews some applicants went on to psychological testing, following which the Board selected Mr. Robert Dowdall and Mr. Wilson King for appointment to the two positions.

Sometime during the course of this process (the date could not be recalled by the witnesses), Mr. Underwood learned indirectly that interviews were being conducted with respect to these positions. He inquired of Chief Stocker as to whether he had been selected for an interview. The Chief said he was not sure, but that he would call back. He did so, informing Mr. Underwood that he would not be interviewed. A meeting in the Chief's office was then arranged. At that meeting Mr. Underwood expressed his belief that his age had had "a definite bearing on [his] application being turned aside." He reported Chief Stocker as having said that "age could have been, but it is very unlikely that it would have been" a factor. At this point it should be noted that, when asked in cross-examination whether he had said words to that effect, Chief Stocker said "I could have. I do not recall." In direct examination he said that "If I had two people that were being equally considered, it [age] could be a consideration." It should be noted, as well, that counsel for the Board, prior to calling upon Chief Stocker to give evidence, stated that it would be his "submission that this evidence will show that the age of Mr. Underwood, while it may have been a factor, was certainly not a major factor or a determining factor in not making a - I will use this term - 'short list'."

Mr. Underwood said that Chief Stocker, who provided no reason to him for having set his application aside, expressed willingness at this meeting to help him get an interview the next time there was an opening. In the course of his testimony Chief Stocker confirmed that he had given Mr. Underwood no reason for having discarded his application, and said that his offer of future assistance to get Mr. Underwood to the interview stage was sincere. In this connection reference should be made as well to a document filed as Exhibit 5 on behalf of the Board. That document is a certified transcript of part of a fact-finding hearing conducted by Mr. Polley in the course of his investigation into, and attempt to resolve, this matter. The only part of the verbatim report of that hearing reproduced in the document concerns discussions entered into with a view to settling the complaint. Although this part of the fact-finding hearing was conducted without prejudice, counsel for the Board sought to introduce this transcript as an exhibit in this hearing and, counsel for the Commission having withdrawn

his initial objection, the parties waived its confidentiality. The document, which was referred to in respect of a number of points during the hearing, makes abundantly clear not only Chief Stocker's, but the Board's, willingness to provide an interview to Mr. Underwood the next time an opening might occur. However, this was unacceptable to Mr. Underwood who found this suggested remedy altogether too uncertain, both as to time and as to the probability in the circumstances of an objective assessment ever being made of his application in the future.

Subsequent to his meeting with Chief Stocker Mr. Underwood learned that at least one person he knew and regarded as less qualified than himself had gone beyond the first stage of the competition, and he brought the whole matter to the attention of the Commission. This led to the issuance on the 29th of October, 1982, of the complaint herein and Mr. Polley's assignment of the task of investigating the complaint and of endeavouring to effect a settlement.

At the commencement of his investigation of Mr. Underwood's complaint, Mr. Polley requested in writing documentation regarding applications submitted for the positions in question. Notwithstanding the investigative powers conferred by section 32(3) of the Ontario Human Rights Code of 1981, Mr. Polley said he was initially denied that information. "I spoke with Mr. Kirkland at that time at the police office in Smiths Falls," Mr. Polley testified, "And he was prepared to let me view this documentation, but he wasn't prepared to give me copies or allow me to take them away." (Apparently, this contravention of section 33(3)(c) of the Code was effected by the Town Solicitor himself, who is counsel to the Board in this matter.) Because this uncontradicted evidence seems to suggest some degree of resistance to, and perhaps even of obstruction of, the investigation, other evidence and admissions of similar vein that emerged during the hearing are most appropriately dealt with at this point. For reasons that will become apparent, it is necessary to go into this at some length.

To begin with, notwithstanding the summons served on Chief Stocker requiring him to attend and produce such documents at the start of this

hearing, counsel for the Commission was unable to obtain copies of the applications to this and other competitions which he wished to review in order to properly prepare the Commission's case. Counsel for the Commission did not make an issue of this when the hearing began on June 27th, presumably because the witness in relation to whose testimony these documents were particularly wanted was not available that day. However, counsel for the Commission wrote requesting these documents on July 5th, and again on August 2nd. Finally, as the date set for the resumption of the hearing was rapidly approaching, counsel for the Commission apparently indicated that he would like to get at least the application forms of the two successful candidates in this particular competition.

When the hearing resumed on August 22nd not only had the documents still not been received by the Commission, but counsel for the Board submitted that they were the property of the two constables, and he said they refused to release them. He then read into the record a letter signed by the two constables, ostensibly written by them, expressing their complete opposition to their applications "being made public in any manner whatsoever", and concluding with the statement that "We have accordingly refused our permission to Chief Stocker for the release of same." It should be observed that counsel for the Commission found this contrived, and counsel for the Board himself described a scenario leading to their signing of this letter which seems to amount to an invitation to the constables to do so:

> "The other two officers - I'll admit that the letter was signed by them because they requested them in common. '[Do] you consent to us [the Board] letting your applications for the job go before this Commission and, I presume, gone over bit by bit, piece by piece, in the presence of members of the press and the radio?' and they said, 'No, we don't want that. Those are our applications and we didn't do them for the purpose of being on the Smiths Falls Record News or the Ottawa Citizen. That's our property - that application. We don't want it disclosed'."

After hearing submissions from counsel, I ruled that these applications would have to be produced, but that they would be dealt with in camera in order to preserve the confidentiality of any information they

contained of a personal or financial nature, such disclosure in public being the stated reason for the purported refusal of the constables to permit Chief Stocker to release their applications. Whether this was their true motivation, however, was placed in doubt by the following statement made by counsel for the Board on November 26th in relation to this very matter:

> "... the officers were concerned because they felt in some ways it was going to be a reflection that they had not been properly qualified and it sort of undermined their role of authority in the community, and it did make the press that it was alleged that these two persons were not really qualified to get the jobs that they have got and I think that they still feel that."

If that is the true motivation for their purported refusal to permit their applications to be released, it raises the question why successful applicants would harbour such fears, and the further question whether those fears were shared by the Board. What was the basis for counsel's statement? Did the constables express those fears either to the Chief or to counsel for the Board, or was it vice versa? If the former, were the constables reassured that their appointments would withstand comparative scrutiny, or were they left in such doubt that they signed a joint letter of refusal apparently prepared for their signatures?

Upon the undertaking of counsel for the Board to bring the application forms later in the day, the hearing proceeded with the examination of Mr. Polley, whose evidence I will come to presently. When the hearing resumed following a luncheon adjournment, it was with the expectation that the applications of constables Dowdall and King would be entered as exhibits, and that Mr. Polley would be questioned in respect of them. However, such was not to be. Whether Chief Stocker concluded on his own that the constables had a property right in their applications, or had been so advised by counsel, or felt that he could override any rights that the Board might have in its records, was not made clear. In any case, the hearing was informed that Chief Stocker had removed those applications from the Board's files, turned them over to the constables, and that he had kept no copies for the Board's own records. Not having the applications he

could comply neither with the June 10th summons within whose reach those documents fell, nor with the ruling made that very morning. Curiously, for the stated purpose of countering any inference that he was trying to keep the applications from the hearing, Chief Stocker was later to volunteer as an explanation of his action on this occasion that "it was a case of having the persons that had given them to me in confidence release that information themselves." To that alleged end this police officer, presumably with knowledge that his constables in fact would attempt to withhold their applications, chose to disregard a duly issued summons, leaving himself open "to punishment by the Supreme Court in the same manner as if for contempt of that court for disobedience to a subpoena," as was spelled out in the summons itself.

The two constables did indeed at first remain steadfast in their refusal to allow their applications to be filed; but they were in attendance, and it was suggested that counsel for the Commission could be accommodated by "outlining what nature of questions he wishes to ask these two officers, if he wishes to call them as witnesses, or what evidence he wishes off the application forms." This suggestion was totally unacceptable to counsel for the Commission who wanted to examine his own witness, Mr. Polley, in relation to the applications.

Counsel for the Board sought to dissassociate himself from this particular episode on the basis that he was not the police officers' counsel and was only relating what had transpired. "... the two officers feel that it is a basic invasion of their rights and that there is an invasion of property which belongs to them, and they're opposing it, that's all I can say." We are invited to conclude that, despite the stern warning on the face of the summons and the obviously official character of the proceedings, and despite their actions having followed upon the heels of their discussions with him, these three law officers neither sought nor were offered the advice of counsel for the Board with respect to their rights and obligations in what they must have known to be a serious matter.

In consequence of this development, counsel for the Board was told that if the applications were not furnished immediately the hearing would

be adjourned, and that whatever action was required to secure these documents would be taken, along with whatever other measures might be deemed appropriate to the circumstances. Following a ten minute adjournment to allow counsel to consult with the constables (whom he said had "demanded" that their Chief turn these applications over to them), the hearing was informed that "out of their great admiration and respect for Chief Stocker, and not to see him get in any problems over this, they are prepared to submit their applications." Thus it was that, of the great many applications that had been called for in the original summons, these two, and only these two, were finally provided to counsel for the Commission, enabling him to proceed with the examination of Mr. Polley in relation thereto.

The evidence of Mr. Polley was that he examined, but was not permitted to photocopy, 60 application forms, making notes about them as he went along. In the result, the best information available with respect to the applications of all but Mr. Underwood and Constables Dowdall and King is that provided by Mr. Polley from his notes. While incomplete, the accuracy of what he recounted went unchallenged. Mr. Polley informed the hearing that he had "looked at areas such as age, height, weight, what their education was, whether high school education - college, university, related experience, their marital status, their sex, the area around which they came from, whether they had good recommendations or not, what their previous or present work was." Referring to his notes, he indicated that, of the 15 applicants who survived the initial screening, 9 had not gone beyond grade 12, and the rest only marginally so; 12 had no apparently relevant experience; their ages ranged from 20 to 31, the average age being 24. With the possible exception of the applications of Mr. Underwood and two other candidates, about whom more will be said in due course, Mr. Polley's evidence does not reveal what criteria, if any, were used to eliminate the 45 applications that did not make it past the first stage, and there is no need to deal herein with the particulars of those applications.

Mr. Polley testified that, after analysing the information contained in the applications he was unable "to deduce from that any reason as to why Mr. Underwood hadn't got past the initial stage." In his conversation with the Board's representatives, Mr. Polley never did get a clear and direct response as to why Mr. Underwood's application had been set aside. He was met with vague references to the kinds of things the Board was looking for in its applicants, and in respect of every desirable characteristic that was suggested, he asked whether Mr. Underwood had satisfied that requirement and the answer was always "Yes." None of this was denied by the Board's only witness, Chief Stocker. Moreover, Mr. Polley testified that, during the course of the fact-finding hearing referred to above, Chief Stocker mentioned his practice of making informal inquiries in the community and referred to a hypothetical case of a candidate getting a poor reference in the process. Mr. Polley said he asked Chief Stocker specifically whether he was referring to Mr. Underwood, and that the answer was "No, that does not apply to Mr. Underwood."

Mr. Polley was unable to discover through his analysis of the information provided to him any reason, other than the possibility of age, for Mr. Underwood's application having been turned aside. His evidence revealed that two other 40 year old candidates (the age of one of whom had been circled in his application) had also been rejected despite backgrounds which, it seemed to Mr. Polley, would have made them more suitable (unless youth were a factor) than most candidates whose applications went on to the next stage. Indeed, counsel for the Board suggested to Mr. Polley that their applications appeared superior to that of Mr. Underwood in terms of experience. Mr. Polley agreed that one did seem to be superior, and that the other might be as well. Counsel for the Board then pursued a line of questioning intended to suggest that prior police or quasi-police work was actually undesirable and that this, rather than their ages, was why these three applications went no further. However, not only did one of the successful applicants have this kind of background, but Chief Stocker's later evidence was simply that such experience was not all that important, not that it was a negative factor. When asked directly whether Mr. Underwood's application was rejected because of his experience, Chief Stocker replied "No. I would not say that was the factor in his rejection,

no." Mr. Polley testified that it was never suggested to him during his investigation or at the fact-finding hearing that Mr. Underwood had been rejected because of the nature of his prior experience.

The only witness to give evidence on behalf of the Board was Chief Stocker, much of whose evidence has already been reviewed. Although the thrust of his evidence was to deny that Mr. Underwood's age was a factor in his application being set aside, Chief Stocker did indicate, as already noted, that age could be a consideration. He did not give a direct answer to the direct question whether Mr. Underwood's age had been a factor. Instead, in a rather rambling response, the Chief suggested that as he was 49 himself at the time he could hardly have concluded that a fit person of 40 was too old to do this kind of work. However, this does not address the real question, which is not whether Chief Stocker thought a 40 year old could do police work, but whether he thought a 40 year old should be hired to commence a police career. As one would expect, the age factor was one of the matters that Chief Stocker and Mr. Polley discussed during the latter's investigation of the complaint. Mr. Polley testified that the Chief expressed concern "about a person who was 40 taking up the duties of a police constable - the problems that could ensue because, as they got older - the experience of Chief Stocker - as police constables get over 50 they experience certain problems ... There was a feeling that a lot of police constables get out around age 55 from police work and someone in Mr. Underwood's position, coming in at age 40, would only be able to put 15 years into a pension plan and there was a perception that - you know - in a sense might penalize them by only being able to contribute for that length of time." Chief Stocker did not deny that prior testimony of which counsel for the Board was aware. Finally, it should be noted that the transcript of the fact-finding hearing which was introduced into evidence by counsel for the Board quotes one member of the Board as saying in relation to age that he was not persuaded "that that factor entered into [the decision], except globally with respect to all factors." Another member of the Board then said "And I agree with that." Elsewhere in that transcript, the first speaker is quoted as saying "They [police departments] indeed want somebody who can work their way through the ranks with propriety, and one of these considerations of course is age."

The Commission's counsel led Chief Stocker through Mr. Underwood's application point by point, and the witness was unable to provide the hearing with any reason apparent on the face of the application for having set it aside. Indeed, when shown the applications of the two successful candidates (both of whom, incidentally, had also been unsuccessful applicants to the Ontario Provincial Police, but for reasons not revealed), Chief Stocker said that they held no advantage over Mr. Underwood in experience, achievement or qualifications, except that one of them, Mr. King, had had experience in giving evidence in court. The other had applied in a previous competition and "his family were well known to some of us at the department."

In the final analysis, Chief Stocker, who had not bothered to check any of Mr. Underwood's references, even though at least two of them were known to him, was driven to respond to the central question of why Mr. Underwood was eliminated at the outset as follows: "Once again we are getting into the area that Mr. Kirkland had discussed, and I do not - my job is based on confidentiality and I do not feel that I can discuss at this time the reason that I had formed an opinion prior to that time" (i.e., prior to the second stage).

The above allusion made by Chief Stocker is to a matter raised by counsel for the Board during the hearing on August 22nd. He indicated that there was a community "underground", a network or grapevine, through which information about some candidates would at times come to Chief Stocker's notice. Moreover, as already noted, the Chief might on occasion initiate inquiries within the community in respect of particular candidates. As the result of correspondence between the June and August sittings of this hearing, it became apparent that counsel for the Board might pursue a line of questions intended to establish that an informal investigation had been conducted within the community in respect of Mr. Underwood resulting in an unfavourable comment about the applicant, and that counsel for the Commission wanted the names, telephone numbers and addresses of any witnesses who would be relied upon in this respect. Counsel for the Board was unwilling to provide the names, and he did not propose to call any such

persons as witnesses. Rather, in order to preserve confidentiality and protect the future effectiveness of this "underground" network, counsel wondered whether the recipients of the information ("probably Chief Stocker and Inspector Blair") could indicate the general nature of that information. It was indicated to counsel that, although hearsay evidence is not always excluded in hearings such as this, the extent to which such evidence would be admitted would be determined at the time it was offered, having regard to its purpose, which might merely be to prove that such statements were made rather than that they were true, and that very little weight, if any, might be attached to it. As it transpired, although it was made clear that he was at liberty to do so, counsel for the Board did not attempt to adduce any such evidence. Nevertheless, the possible existence of "reasons" which confidentiality would not permit this Board of Inquiry to be privy to having been thus insinuated into this hearing, allusions to those "reasons" (such as that of Chief Stocker) were made from time to time thereafter.

ANALYSIS OF FACTS IN RELATION TO LIABILITY

It is well-established that the burden of proof rests with the Commission, which had the carriage of this complaint, to establish at least a prima facie case of discrimination by the Board against the complainant on the basis of his age in its disposition of his application for employment as a police constable. Obviously, it is unnecessary to secure a confession of unlawful discrimination in order to discharge this onus, and a board of inquiry is entitled to infer discrimination from the circumstances even where there is no direct evidence of it. (For instance, see O'Brien v. Ontario Hydro (1981), 2 C.H.R.R. D/504 and Paul S. Carsen, Ramon Sanz, William Nash, Barry James, and Arie Tall v. Air Canada (1984), 5 C.H.R.R. D/1857.) On the basis of the evidence presented during this hearing, it is abundantly clear that the Commission has fully discharged this burden, and that the respondent Board has failed to counter the case thus made out against it. While it may be that the burden of proof does not shift to the respondent to prove specific non-discriminatory reasons for its decision, a prima facie case having been made out against it, the

respondent must at least articulate lawful reasons for its actions, consistent with the evidence. (Re Base-Fort Patrol Ltd. and Alberta Human Rights Commission (1983), 43 D.L.R. (3d) 334.) This the Board has failed to do.

The matters raised in this complaint concern not only the actions and statements of members of the Board taken and made in that capacity, but actions and decisions taken on its behalf by its servants and agents. Having regard to the general law in respect of such matters, and to sections 44(1) and 45(c) of the Ontario Human Rights Code, 1981, I have no hesitation in attributing to the Board itself responsibility for the actions and decisions of Chief Stocker in the course of his employment with respect to the matters raised in this complaint. As counsel did not suggest anything to the contrary, it is unnecessary to provide a dissertation as to the applicable law. However, I would refer in this respect to Cindy Cameron v. Nel-Gor Castle Nursing Home and Marlene Nelson, (1984), 5 C.H.R.R. D2170, beginning at paragraph 18512.

The employment procedures adopted and sanctioned by the Board involved the making of judgments at various stages. Names were not pulled out of a hat, and Chief Stocker, to whom the implementation of the first stage was to all intents and purposes delegated, had to have had reasons for setting aside certain of the applications and retaining others for further consideration. It was not suggested that applications were discarded or retained for no reason whatsoever, which would have been outrageously irresponsible in the hiring of police officers. Thus, in the absence of a legitimate reason for discarding an application, the inescapable conclusion is that the reason was not legitimate.

With respect to each and every factor or criterion suggested by or on behalf of the respondent as a basis for its screening decisions, the evidence is that that factor or criterion was not the reason for having set aside the complainant's application. Apart from the unsubstantiated insinuation that there was a bad reference of unrevealed character from an undisclosed source, the respondent was unable or unwilling to assign any reason for discarding the complainant's application. Thus, unless we are

to accept as the sole proximate cause of the decision complained of some vague reference that was not even attempted to be introduced into evidence, we are driven inexorably to the conclusion that the reason for discarding Mr. Underwood's application at the initial stage was not legitimate, the only such reason in question being his age.

Quite apart from the conclusion that this process of elimination brings us to, other evidence points to age as having been a major factor in the evaluation of applications. The oldest candidate whose application survived the initial screening was 31. The investigation that went back to 1980 revealed that, since then at least, the oldest constable at the time of hiring was 27. The respondent's only witness admitted that Mr. Underwood's application was superior to that of one of the successful candidates and, if not superior, at least equal, to that of the other. The applications of two other 40 year old candidates had also been discarded despite their apparent superiority to that of Mr. Underwood and, inferentially, to those of the successful candidates. The age of one of them had been circled on the application, which red-flagging was unnecessary in Mr. Underwood's case because he had drawn attention to his age in his covering letter. It should be observed, as well, that there was no suggestion that the reason for the rejection of these two other older candidates was a bad reference from the community grapevine. If they had been discriminated against because of their ages, and the evidence certainly points in that direction, are we to believe that Mr. Underwood's age was not the decisive factor in his elimination from the competition? The evidence shows as well that during the course of the investigation the Police Chief and members of the Board indicated that age was a consideration, and counsel for the Board said as much in the course of his various submissions and final argument.

I am convinced by the evidence that age was an influential factor in the screening process generally, and that it was, therefore, at least one of the reasons that caused Chief Stocker to set Mr. Underwood's application aside. Moreover, for reasons that I will come to presently, I am of the view that it was the only reason for his elimination at that initial stage. But first, it must be pointed out that it has been repeatedly held that

where a prohibited ground (such as age discrimination) is one of a number of reasons for the action in question having been taken, that is sufficient to constitute an infringement of the statutory right in question, if it is a proximate cause of the decision. (See, for instance, Ianco v. Simcoe County Board of Education (1983), 4 C.H.R.R. D/1203.)

As noted earlier, counsel for the Board suggested that the reason for setting aside Mr. Underwood's application might have been negative feedback from the Chief's network of informal contacts in the community. Although the Chief's practice of soliciting or accepting information in this way had been disclosed at the time of the investigation, it was not until after the first day's sitting in this hearing that this line of defence surfaced. I find it incredible that, if Chief Stocker's reason for setting aside Mr. Underwood's application had been that he had heard bad things about him, he would not have so informed Mr. Polley. Not only did he not do that, but when asked specifically whether he had received any negative information about Mr. Underwood in this way, he replied that he had not! Counsel for the Board heard that sworn testimony of Mr. Polley, and he neither challenged it in cross-examination, nor invited Chief Stocker to deny it. Moreover, despite this belatedly alleged reason for rejecting the complainant's application out of hand, when Mr. Underwood went to see him Chief Stocker concluded their discussion with a promise to get him an interview next time. And he testified that he sincerely meant it. The Board repeated the offer at the fact-finding hearing. Apparently, if any information about Mr. Underwood had been received, it must have been of little significance. However, I simply cannot accept this self-serving rationalization offered in argument some three years after the event. It is unsupported by any evidence, it is inconsistent with the evidence generally, and it stands in stark contradition of the uncontroverted evidence of Mr. Polley as to what Chief Stocker said some three years ago. It is my conclusion that Mr. Underwood's application was not set aside because of unfavourable information received about him, but simply and solely because he was 40 years of age.

Counsel for the Board suggested that there could be no unlawful discrimination unless there was the intention to discriminate, and he

submitted that the evidence did not support a finding of the requisite intention. In support of the first premise of this argument he referred to the decision of the Ontario Court of Appeal in Ontario Human Rights Commission et al. v. Simpsons-Sears Ltd. (1982), 38 O.R. (2d) 423, which held that a discriminatory intention was an essential element of a contravention of s. 4(1)(g) of the Ontario Human Rights Code, R.S.O. 1980, c. 340. As counsel for the Commission pointed out, this case (which was the only authority referred to by counsel for the Board in the course of this hearing) dealt with the interpretation of a section of the previous Code, since repealed. The Court of Appeal, in rather unusual fashion, had resort to subsequent legislation (viz., its successor, the 1981 Code, which applies to the present proceedings) in order to assist in the interpretation of the earlier legislation. It was in part because the new legislation (that which governs these proceedings) clearly does not require a discriminatory intention that the Court of Appeal concluded that its differently-worded predecessor (the legislation that applied in Simpson-Sears Ltd.) did require such an intent. Moreover, it should be noted that the Court of Appeal decision in Simpsons-Sears Ltd., which seemed inconsistent with the decision of the Supreme Court of Canada in Ontario Human Rights Commission et al. v. Borough of Etobicoke (1982), 132 D.L.R. (3d) 14 (as was admitted by Mr. Justice Lacourcière in an addendum to his judgment on behalf of the Court of Appeal), has just been overruled by the Supreme Court of Canada whose decision has not yet been reported.

Although a discriminatory intention is not required in order to establish the infringement, contrary to section 8, of a right given by s. 4(1), of the Code, I have come to the conclusion that the discrimination in this case was intentional. As I have already indicated, the sole reason for Chief Stocker's having set the complainant's application aside during the screening process was his age. That being so, the substance of his thought and intention had to have been that "this man is too old to start a career as a constable on our force and so I will set aside his application." Since he was undoubtedly authorized by the Board to undertake this screening process on its behalf, the rejection of Mr. Underwood's application, contrary to section 4(1) of the Ontario Human Rights Code, was that of the Board, and it now remains for me to deal with the remedy.

REMEDY

The nature and scope of the orders which, as a board of inquiry, I am empowered to make in respect of my finding that the complainant's right under the Code was infringed by the Board in contravention of section 8 of the Code are set out in s. 40(1), paragraphs (a) and (b), of the Human Rights Code as follows:

> (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
>
> (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding $10,000, for mental anguish.

Counsel for the Commission requested the making of orders pursuant to each of these provisions. As to paragraph (a), the Commission saw no need of any order in respect of the complaint itself, but asked for an order in respect of future practices of the Board. He requested an order directing the Board

> (1) to permit the Commission "to view the application forms and the procedures now being practised by the Smiths Falls Police Commission with respect to hiring practices in order to ensure that they comply with the Code;" and
>
> (2) "to order the Police Commission to produce a written policy statement with respect to their understanding of the legislation and their intention to comply with it, and indicating that they will make it known to their staff that they intend to comply with the provisions of the Human Rights Code."

I have decided to accede to these requests as being singularly salutary in view of the remarkable behaviour of the Board and its servants and agents from the moment this complaint was filed right up until the close of the hearing. First, there was a degree of reluctance to co-operate with the Commissioner's investigator verging on obstructing him in his duties. The Town Solicitor, who is counsel to the Board in this matter, prevented the investigator from making copies of documents as he has a statutory right to do. Although he was given access to these documents, it would be totally unreasonable to expect the investigator to copy every word in them, or to divert an inordinate amount of time from the analysis of data simply to make notes of points that might at first seem salient, or to travel back and forth from another city to re-check data. Second, there was the alarmingly cavalier treatment accorded by the Board's Chief of Police to a summons duly issued by me pursuant to the Statutory Powers procedure Act of this province. Third, there was what must have been either a deliberate attempt by the Police Chief and the two successful constables to keep their applications from this hearing, or else these officers exhibited an astounding degree of ignorance of their rights and duties and of indifference to these proceedings. When one searches for a possible explanation of their behaviour, the alternatives that come to mind are these: either counsel for the Board, who had given his own undertaking to (at last) furnish these documents, did not resist this manoeuvre by explaining to these officers their legal obligations, at least as he understood them to be, or else, he did so advise them; if he did not, I would suggest that he ought to have done so in view of his own undertaking, and in the interests of the respondent; if he did, then either they simply refused to follow his advice, or they simply followed it. It would appear from all of this that the Board of Commissioners of Police for the Town of Smiths Falls, and the members of its police force, and its other servants and agents do not understand or take seriously the Human Rights Code of this province. Therefore, the order requested pursuant to paragraph (a) of section 40(1) will be issued.

As to the orders that might be made pursuant to section 40(1)(b), counsel for the Commission pointed out that the complainant's financial

situation had not been worsened by the discrimination, since he was actually earning more at the time of his application (and thereafter) than he would have received as a police constable. Thus, there was no question of making restitution or providing compensation for monetary loss. However, it was submitted that the infringement of the complainant's right had been wilful, and it was requested that an order be made for the payment to the complainant of an award for the mental anguish he had suffered. It was suggested that, in the circumstances of this case, an award within the range of $3,000 to $5,000 would be appropriate.

For reasons that have already been stated, I find that the discrimination was intended and, since "wilfully" in paragraph 40(1)(b) appears to mean "intentionally," "knowingly" or "deliberately," I find that the discrimination in this case was "engaged in wilfully." (See the Cindy Cameron case cited above.) Moreover, I find that the discrimination in this case was "engaged in recklessly" as well, in that the respondent's conduct was "such as to evince disregard of or indifference to consequences, that is the conduct [was] done with rashness or heedlessness." (Cindy Cameron, paragraph 18546.)

The complainant, Mr. Underwood, clearly suffered mental anguish as a result of this discrimination. He had had a life-long ambition to become a law enforcement officer. He is a man of athletic ability and imposing stature with an obvious bent towards the order and discipline of military or police service. Even though it would have meant a loss of income had his application been successful, he saw this as perhaps his last and best chance to realize this long-standing ambition, and he was willing to incur that financial loss in order to do so. He devoted considerable spare time to auxiliary police work in order to better prepare himself. He applied to two other police forces, losing out in one bid because of his eyesight and in the other because (in his mind, at least - and it is his mental anguish we are concerned with) of nepotism. To discover that he was not considered even good enough to get beyond the initial screening for two positions at Smiths Falls must obviously have been a significant blow to his pride, to his dignity, to his sense of self-worth. Then, to discover that others he felt were inferior in "experience, achievement and qualifications" (as

indeed most of them were) had gone further in the competition must have been galling in the extreme. He did not want to believe that he was inferior to all these others, and so he felt (and rightly so) that it must have been his age. His bitterness and hurt are indicated in his own understated style:

> "What sort of bothered me, what sort of spurred me on about this, that really upset me, was that an individual was -- he stopped me on the corner and asked me if I got an interview. And I said, 'No, I did not.' And he said, 'Oh, I got an interview.' And I know I have more education, I have more certificates of achievements than this individual, and what sort of -- that is what sort of made me mad at that particular time. You know, how did he write the Otis test and I did not even get that far? You know, what happened here? And that really made me mad."

The Board, whose discrimination I find to have been deliberate, knew all along therefore that Mr. Underwood's application had been rejected because of his age. Yet, rather than admit this to be so and arrange some settlement of the matter as they were invited to do, the members of the Board and Chief Stocker have steadfastly maintained right up to the present that there was no discrimination, but that there was a good and valid reason for casting Mr. Underwood's application upon the discard pile. As a consequence, for three years now Mr. Underwood has had to live with some degree of self-doubt. Since the existence of his complaint is public knowledge, he has had to live with the realization that the community at large might well believe that there was some deficiency in his ability or character. Moreover, the injury he has suffered is made more serious, as counsel for the Commission argued, by the discrimination having been practised by a public body whose judgments are bound to be more publicized, and far more likely to be assumed by the public to be sound, than would those of a private organization.

Although there was no evidence of depression or other physical manifestation of Mr. Underwood's mental anguish, there was substantial and protracted injury to his dignity and self-respect and there was the deprivation of his right to freedom from discrimination, and this is precisely the kind of injury that the award of general damages provided for

in s. 40(1)(b) is intended to alleviate. There is an exhaustive treatment of section 40(1)(b) provided in the Cindy Cameron case referred to earlier, and rather than to repeat that exercise, I will simply say that I am entirely in agreement with its general analysis and with the following passages in particular (running from No. 18525 to No. 18548, but not including the entire text of these paragraphs):

> There is a presumption in favour of the making of an award of special and general damages in human rights cases. (18525.)
>
> Although damage awards in human rights cases historically were small in size, they have become progressively more substantial in recent years. It is now a principle of human rights damage assessments that damage awards ought not to be minimal, but ought to provide true compensation other than in exceptional circumstances, for two reasons. First, it is necessary to do this to meet the objective of restitution, as set forth above. Second, it is necessary to give true compensation to a complainant to meet the broader policy objectives of the Code: It is important that damage awards not trivialize or diminish respect for the public policy declared in the Human Rights Code. (18526. Emphasis added.)
>
> The new Code, like the old Code, allows for the award of general damages for, inter alia, injury to dignity and self respect, and loss of the right to freedom from discrimination. (18537.)
>
> Where a contravention of the Code results in injury to the complainant's dignity or self-respect, general damages for this loss should reflect the seriousness of the injury caused. (18538.)
>
> An inherent, but separate, component of the general damage award should reflect the loss of the human right of equality of opportunity in employment. This is based upon the recognition that, independent of the actual monetary or personal losses suffered by the complainant whose human rights are infringed, the very human right which has been contravened itself has intrinsic value. The loss of this right is itself an independent injury which a complainant suffers. (18539.)

It seems to me that the first two lines of paragraph 40(1)(b) afford a complainant with the remedy of special and general damages as provided by the old Code as interpreted by boards of inquiry, and that the

> last three lines of paragraph 40(1)(b) go further, and provide for what is, in effect, punitive damages "where the infringement has been engaged in wilfully or recklessly." (18548.)

After a lengthy and careful consideration of the matter, Professor Cumming, in Cindy Cameron, reached a conclusion with which I completely agree. Although there might be some doubt as to whether an award of damages under the preceding parts of section 40(1) might include some punitive element, he concluded that where the infringement has been engaged in wilfully or recklessly, an award of monetary compensation for mental anguish pursuant to the last three lines of section 40(1)(b) might involve a punitive element:

> In my view, the last three lines of paragraph 40(1)(b) of the Ontario Code must be interpreted as meaning that an award beyond mere compensation (which may be awarded under the first two lines of paragraph 40(1)(b)) may be given, and such award can have a punitive element (even though called monetary "compensation") when the circumstances of the last three lines are present. (18561.)

In reviewing other awards of general damages made by boards of inquiry it is apparent, as counsel for the Commission has indicated, that the range of the award he suggested is rather high, particularly if no punitive element were involved, and even taking into account the inflationary factor that ought to colour one's perception of earlier awards. However, where punitive-type reasoning has been invoked the award of general damages might indeed be high. For instance, in Betty Hendry v. Liquor Control Board of Ontario, (1980), 1 C.H.R.R. D/160, where employment had been denied because of the complainant's sex, the Board (Professor D.A. Soberman) awarded her backpay and an additional sum as general damages:

> She has suffered emotionally as a result of the failure of L.C.B.O. to abide by the Code, and has been insulted as a woman. As the solace available in these circumstances, both to make it clear to Ms. Hendry that her unfair treatment is recognized by this Board and to the L.C.B.O. that it must take very seriously the harm done by failure to abide by the Code, I would award Ms. Hendry the additional sum of $8,000.00 as general compensation.

In the present case, there are a number of matters besides this punitive element that I think should be borne in mind in addressing the question of quantum in this case. The setting of the maximum amount that may be awarded as general damages at $10,000 is undoubtedly a reflection of legislative concern over the extent of power to be conferred on boards of inquiry under the Code, and not meant as a benchmark against which these awards are to be measured. It is not suggested, surely, that a board of inquiry should scale down its award by comparing the circumstances before it with the most horrific circumstances of mental anguish imaginable for which alone the maximum award would be available. Obviously, the worst conceivable cases of mental anguish could not be adequately redressed by an award of $10,000 in general damages, and if all other cases are to be scaled down according to the relative degree of anguish suffered, the quantum of general damages awarded in most cases would be trivial.

It is apparent that the initial reticence of boards of inquiry to make more than the most minimal awards is giving way to the view that damages ought to be more substantial. In my view, a board of inquiry under the Ontario Human Rights Code has not only the power, but the responsibility, to determine actual loss and order true compensation, and that power and responsibility flows from the nature of justice and the principle of compensation incorporated into section 40(1)(b) by the first two lines thereof. As was said by the Review Tribunal in Foreman et. al. v. VIA Rail Canada, Inc., (1980), 1 C.H.R.R. D/233:

> The root principle of the civil law of damages is "restitutio in integrum": the injured party should be put back into the position he or she would have enjoyed had the wrong not occurred, to the extent that money is capable of doing so, subject to the injured party's obligation to take reasonable steps to mitigate his or her losses. (D/238)

With respect, in my opinion, the obligation to provide true compensation has little to do with the avoidance of trivialising, or diminishing respect for, the public policy declared in the Code. It is not as though but for that policy the obligation would be to under-compensate for actual losses arising out of the infringement, or as though because of that policy the obligation is to over-compensate for such losses. The enactment of human rights legislation such as this has precluded the

natural extension of common law tort liability into the field of economic loss caused by unlawful discrimination (Board of Governors of Seneca College of Applied Arts and Technology v. Bhaduria (1981), 124 D.L.R. (3d) 193, S.C.C.), and, in my opinion, it is the function of the first two lines of section 40(1)(b) to serve instead as the compensatory remedy. I read the last three lines of the provision as emphasizing the evident policy of the Code to protect the dignatary interest from the serious abuse of discrimination on socially unacceptable grounds, injuries to that interest being classified within the rubric of "mental anguish." Thus, in my view, it is the making of an award in respect of this kind of injury that runs the risk of trivializing or diminishing respect for the public policy declared in the Code.

Having regard to the nature and extent of the complainant's suffering, to the need to ensure proper respect for the law established by this legislation, particularly on the part of a body that is not only public but whose function is law enforcement, and to the obstructive tactics employed on behalf of the Board, verging at one point on being in contempt of the Board of Inquiry, I have assessed the general damages to be awarded to the complainant in this case at $3,000. If I had been of the view that no punitive element could or should be a factor in assessing these damages, I would have assessed them in the amount of $2,000.

Dated this 20th day of December, 1985

H.A. Hubbard
Chairman
Board of Inquiry

IN THE MATTER of the Ontario Human Rights Code

AND IN THE MATTER of a complaint by John George Underwood against the Board of Commissioners of Police for the Town of Smiths Falls, Dr. A.B. Murphy (Chairman) and Their Servants and Agents.

C 2 4

ORDER

This matter came on for hearing before me on June 27th, August 22nd and November 26th, 1985, pursuant to my appointment by Robert G. Elgie, Minister of Labour, dated the 27th day of May, 1985, in the presence of counsel for the Ontario Human Rights Commission and Mr. John George Underwood, the Complainant, and counsel for the Board of Commissioners of Police for the Town of Smiths Falls, Dr. A.B. Murphy and Their Servants and Agents, the Respondents. Upon hearing the evidence adduced by the parties and what was alleged by them, and upon the finding of this Board that the complaint of the said Mr. Underwood was substantiated and that the Respondent, The Board of Commissioners of Police for the Town of Smiths Falls, through the actions of its members and of their Chief of Police, Mr. William Stocker, had discriminated against the said Mr. Underwood in contravention of section 4(1)(a) of the Ontario Human Rights Code because of his age:

> It is hereby ordered that the Board of Commissioners of Police for the Town of Smiths Falls shall pay to Mr. John George Underwood the sum of $3,000.00 (three thousand dollars) as general damages for mental anguish suffered by way of humiliation, injury to feelings and dignity and deprivation of his right caused by the deliberate act of discrimination.
>
> It is further ordered that, to assure compliance with the Ontario Human Rights Code in respect of its future practices, the Board of Commissioners of Police for the Town of Smiths Falls: (1) permit the Ontario Human Rights Commission, through its officers or agents, at some reasonable time or times convenient to both parties, to view the Board's application forms and to review its recruitment procedures to ensure that they are in compliance with the Ontario Human Rights Code;

and (2) to prepare and submit to the Ontario Human Rights Commission for its approval a written policy statement expressing its understanding of the application of the Ontario Human Rights Code to its recruitment procedures and its intention to comply with the requirements of the Code; and (3) to provide the Ontario Human Rights Commission with its undertaking to make this policy statement known to its employees and to applicants for employment.

Dated this 20th day of December, 1985.

Chairman
Board of Inquiry